No. 253.

Brief of Walter & May for D. & E.

FILED
OCT 10 1899
JAMES H. McKENNEY
Clerk

Filed Oct. 10, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

ADA F. McDONNELL,
Plaintiff in Error,
vs.
LLEWELLYN JORDAN,
Defendant in Error.

No. 253.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

MOTION TO DISMISS OR AFFIRM, AND BRIEF IN SUPPORT OF MOTION.

RICHARD W. WALKER,
HEBER J. MAY,
Attorneys for Defendant in Error.

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IN THE

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

Motion to Dismiss or Affirm and Brief in Support of Motion.

Comes the defendant in error herein and moves the Honorable Court to dismiss this writ of error, as this court has no jurisdiction thereof; or to affirm the judgment, it being manifest that, even if the court has jurisdiction, the question on which the jurisdiction depends is so frivolous as not to need further argument, and that the writ was taken for delay only.

RICHARD W. WALKER,
HEBER J. MAY,
Attorneys for Defendant in Error.

To William Richardson, Esq., and Lawrence Cooper, Esq., attorneys of record for Plaintiff in Error in the above entitled cause.

You are hereby notified, that the defendant in error in the above named cause will, on Monday the 30th day of October, A. D. 1899, on the meeting of the Supreme Court of the United States, on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the foregoing motion, and the brief thereon hereto attached.

RICHARD W. WALKER,
HEBER J. MAY,
Attorneys for Defendant in Error.

Service of the foregoing motion and brief in support of the same is hereby admitted this 7th day of October, 1899.

William Richardson

Lawrence Cooper.

Counsel for Plaintiff in Error.

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR ON MOTION TO DISMISS OR AFFIRM.

The plaintiff in error, Ada F. McDonnell, a citizen of Alabama, having instituted a contest of the instrument filed for probate as the last will and testament of her sister, Mattie Lee Fennell, the defendant in error, Llewellyn Jordan, a citizen of Mississippi, the sole legatee and devisee under that instrument, filed his answer to the statement of grounds of contest, and removed the contest

from the State Probate Court into the Circuit Court of the United States, on the ground of prejudice or local influence. The contest was tried in the Circuit Court, resulting, on the 8th day of November, 1898, in a verdict and judgment in favor of the contestee. (Printed record, p. 53.) No ruling of the lower court was reserved by bill of exceptions, but the contestant sued out a writ of error on the 15th day of March, 1899, (Record, p. 55); and on that day the judge who had presided undertook, at Birmingham, Alabama, outside of the Northern Division of the Northern District of Alabama, to certify questions of jurisdiction to this court. The defendant in error now moves the court to dismiss the writ of error, or to affirm the judgment of the Circuit Court.

The following propositions are submitted:

1. That the court is without jurisdiction of the writ of error, as no question of jurisdiction has been "certified to the Supreme Court from the court below for decision," as required by the provision of section 5 of the Act to establish Circuit Courts of Appeals, &c.

2. That, if the court has jurisdiction of the writ of error, the questions sought to be presented are not properly before the court, as they are not presented for review by any bill of exceptions.

3. That the case is plainly one of which the United States Court could acquire jurisdiction.

4. That, even if the motions to remand, to strike, &c., can be considered as properly disclosed by the record, the rulings of the lower court were correct, and the judgment should be affirmed.

I. The Certificate of the Questions of Jurisdiction was not made by the Circuit Court during the Term at which the Judgment was Rendered.

That such certificate is an act of the court required to be done during the term is well settled by the decisions.

Colvin v. *Jacksonville, 158 U. S., 456.*
Chappell v. *United States, 160 U. S., 507.*

The record shows (printed record, p. 54) that the certificate was made by the Hon. John Bruce, the judge who had presided, at Birmingham, Ala., on the 15th day of March, 1899. The certificate recites that the plaintiff in error had prayed for and obtained a writ of error. The record shows (printed record, pp. 55,58) that the petition for the writ of error and the assignment of errors were not made or filed until March 15th, 1899. It thus plainly appears, outside of the statement of the judge to that effect, that the date, November 8, 1898, of the filing and signing of the certificate did not speak the truth, and that no certificate was made by anyone until the 15th day of March, 1899.

In this state of the record it plainly appears that the certificate was not made by the court while in session. It shows that the judge who had presided was no longer in the Northern Division of the Northern District of Alabama. The Circuit Court for that Division could not be held by a judge outside of the territorial limits of the Division. The Act of Congress of May 2d, 1884, (23 St. L., 18; Sup. R. S., p. 427) requires the terms of the Circuit and District Courts for the Northern District of Alabama to be "held therein at the times and places now prescribed by law". The law then in force (1 Supplement to Rev. St., p. 38) prescribed the City of Hunts-

ville as the place for holding said courts, and fixed the times for holding the regular terms.

Where the statute names the specific place for holding court, it cannot be legally held elsewhere. The presence of a presiding judge at a place where the court is authorized to be held is essential to the existence of a court, There is no court unless its officers, and the time and *place* of holding it, are such as are prescribed by law.

Hobart v. *Hobart*, 45 Iowa, 503.
In re Terrill, 52 Kan., 29; Am. St. Rep., 327.
Bacon's Abridgment, tit. "Court", A.
I Ency. of Pleading & Practice, p. 243.
Hawes on Jurisdiction, sec. 27.
Garlick v. *Dunn*, 42 Ala., 404.
Northrup v. *People*, 37 N. Y., 205.
People v. *Sullivan*, 115 N. Y., 185.

The statutes prescribing methods of adjournment in the absence of a judge very clearly imply that a court cannot be a "going concern" without the actual presence of a presiding judge. Rev. St. U. S., Secs. 671, 672. There is the same implication in the various provisions and rules conferring special powers on judges of courts not in session and as to matters in reference to which courts are deemed to be always open. Except as to the special instances thus provided for, the court is not in existence for any purpose without the actual presence of a competent presiding judge at the place prescribed by law.

The court takes judicial notice of the times and places prescribed by law for holding the Circuit Courts. 12 Am. & Eng. Ency. of Law, 182, 183. It is shown by an affidavit filed on a motion for a writ of *certiorari* in this case, that on the 15th day of March, 1899, Judge Bruce was holding the regular term of the Circuit and District

Courts of the Southern Division of the Northern District of Alabama, at Birmingham, Ala.

That the court was in session when the certificate was made cannot be inferred from the fact that the record contains an order of final adjournment, dated March 16th, 1899, when the record affirmatively shows that the signing of the certificate was by the judge outside of the Division; and so was not an act of the court, but was merely the act of a judge, who was not authorized by law to perform this function of the court at the place where the act was done.

A certificate was essential in this case. Under the statute giving the right to an appeal or writ of error to this court "in any case in which the jurisdiction of the court is in issue", the extent of the losing party's right is to have a review by this court of the rulings of the lower court on specific questions of jurisdiction, which "alone shall be certified to the Supreme Court from the court below for decision". The right to obtain a revision is limited by the statute. Not only must the case be one "in which the jurisdiction of the court is in issue", but the lower court must rule on such question of jurisdiction, and such question must be certified. The right to a revision is made dependent upon a due presentation of such question by the lower court to this court. The writ of error does not remove the entire case to this court. It is not incumbent upon this court to search through the record to find if questions of jurisdiction are lurking there which were not raised in the lower court. The court will do this where the writ of error operates to bring before it, for its revision generally, the record of the lower court; but the plaintiff in error certainly has no right to such general revision of the record where the scope of the writ of error, as fixed by the statute, is to present for re-

view only rulings of the lower court on specific questions of jurisdiction. It will be shown later on that the *record* does not disclose that any question of jurisdiction was presented to the lower court for its decision. In such a case as this not only must the record show that there was a ruling on a question of jurisdiction, but the question must be certified.

II. The motion to remand, and the other motions referred to in the assignment of errors, and the rulings of the court thereon, not having been made a part of the record by incorporation in a bill of exceptions, the rulings of the trial court which are the objects of such assignments of error are not presented for review on this writ of error.

Let it be conceded that the certificate was made by the court during the term, yet it could present for review here only such questions of jurisdiction as the *record* shows were involved in the decision below. *Chappell* v. *United States*, 160 U. S., 507. The various motions, to remand, to strike, &c., which are copied in the transcript transmitted from the court below, form no part of the *record* in the case, as they are not presented for review by any bill of exceptions. Such motions, and the rulings of the court theron, must, in order to be reviewed on appeal or writ of error, be taken up on a bill of exceptions. 3 Ency. of Pleading and Practice, p. 392. A bill of exceptions is necessary to put into the record that which would not properly appear without it. *The S. C. Tryon*, 105 U. S. 267; *New York &c. Co.*, v. *Madison*, 123 U. S. 524. The mere insertion of such motions in the transcript sent up by the clerk does not make them a part of the record to be reviewed by this court. The rule pre-

vailing in Alabama, that the only method by which the ruling of the lower court upon a motion can be reviewed by an appellate court is by incorporating the motion in a bill of exceptions (*Ewing* v. *Wafford*, 25 So. Rep., 251), also prevails in this court. In this regard rulings upon motions stand upon the same footing as rulings on instructions asked. In reference to such rulings, this court said, in the opinion in the case of *Clune* v. *United States*, 159 U. S. 590:

"Finally, there is a claim of error in the instructions, but the difficulty with this is that they are not legally before us. True, there appears in the transcript that which purports to be a copy of the charge, marked by the clerk as filed in his office among the papers in the case; but it is well settled that instructions do not in this way become a part of the record. They must be incorporated in a bill of exceptions, and thus authenticated by the signature of the judge. This objection is essentially different from that of the lack or sufficiency of exceptions. An appellate court considers only such matters as appear in the record. From time immemorial that has been held to include the pleadings, the process, the verdict, and the judgment, and such other matters as by some statutory or recognized method have been made a part of it."

It has been several times decided that a motion to remand cannot be considered by an appellate court unless it appears in a bill of exceptions. 3 Ency. of Pleading and Practice, 393,395. The ruling of the trial court on the motion to remand cannot be reviewed by this court on the pending writ of error because the motion is not in any proper way made a part of the record certified to this court. The fact that any such motion was made cannot be recognized. The case is to be treated as if the trial had been had in the lower court with-

out any objection being made to the removal proceedings.

In the case of *Stern* v. *Collier*, 101 Ala., 424, the effort was to have the Supreme Court review the action of the trial court in overruling a motion to set aside and vacate an order contained in a judgment entry. The court declined to consider the question, and dismissed the appeal, saying:

"But the question is not presented by this record. We find in the transcript motions to set aside the orders, denials of the motions, and recitations that 'moveant excepted.' None of these matters belong to the *record* of the court below. They could only be made a part of the record for the purposes of appeals by bills of exceptions. Neither one of the transcripts contains a bill of exceptions. We are not allowed to consider these matters unless they are certified to us in the only way provided by law-incorporated in bills of exceptions, signed by the presiding judge, and transcribed and certified to us by the clerk of the court."

The petition for removal (Printed Record, pp. 1, 2) shows the requisite diversity of citizenship and value of the matter in controversy to confer jurisdiction on the United States Court. Any objections going merely to the time or mode of getting the case into the United States Court could be waived by a party. Any such objections in this case are to be treated as not having been made at all, but as having been waived, as they have not been brought into the record by a bill of exceptions. The provisions of the removal statute as to the form of proceeding to effect a removal, and as to the time of applying for a removal, are not jurisdictional, but are merely formal and modal, and may be waived. *Ayers* v. *Watson*, 113 U. S., 594.

"Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court of its own motion, will order the action to be dismissed. But the provisions as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived by entering a general appearance, without taking the objection." *Interior Construction & Imp. Co.*, v. *Gibney*, 160 U. S., 217.

In the present case, any objections as to the mode and time of the removal into the Federal Court or as to the party by whom the removal was effected, did not "touch the general jurisdiction of the court over such a cause", but went merely to matters of procedure, rulings upon which are not reviewed by the appellate court unless properly presented for its revision.

It is submitted that all questions as to the mode or time of getting the case before the United States Court have been waived so far as this court is concerned by the failure to reserve such questions for review; and that, whether the certificate is sufficient or not, nothing more can be considered than the bare question whether the record discloses a case of which the United States Court could in any way acquire jurisdiction.

III. The case is one of which the United States Court could acquire jurisdiction.

The Act of 1887–'88 authorizes a removal on the ground of prejudice or local influence, by a defendant

who is a citizen of another State, "where a suit is now pending, or may be hereafter brought, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State", etc.

Any proceeding which comes within the description, "a suit * * * in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State", is within the grant of jurisdiction.

It is submitted that a consideration of the Alabama statute providing for the contest of wills leads inevitably to the conclusion that such a contest is a "suit," within the meaning of the removal statutes.

After making provision for proving wills in the Probate Court, upon giving notice to the widow and next of kin in a manner prescribed, (Code of Ala. 1896, Secs. 4273, 4284, 4285), the following provisions, sections 4287 and 4298 respectively, of the Code of Alabama of 1896, are made for contesting the validity of wills.

"*Contest; Grounds* and by *whom instituted; how issue made up and tried.* A will before the probate thereof, may be contested by any person interested therein, or by any person who if the testator had died intestate, would have been an heir or distributee of his estate, by filing in the court where it is offered for probate allegations in writing that the will was not duly executed, or of the unsoundness of mind of the testator, or of any other valid objection thereto; and thereupon an issue must be made up, under the direction of the court, between the person making the application, as plaintiff, and the person contesting the validity of the will, as defendant; and such issue must, on application of either party, be tried by a jury."

"*Contest in Chancery within eighteen months.* Any person interested in any will, who has not contested the same under the provision of this article, may, at any time within eighteen months after the admission of such will to pro-

bate in this state, contest the validity of the same by bill in Chancery, in the district in which such will was probated, or in the district in which a material defendant resides."

A proceeding for the probate of a will is

These statutes provide the only modes now recognized by the law of Alabama of determining the question of the existence *vel non* of an alleged will. They supersede all common law methods of determining that question, establishing an entirely new system of procedure in place of the methods recognized by the common law. The result of the provisions is to afford to the heir or distributee the option of contesting the alleged will either in the Probate Court before it has been proved in that court, or in the Chancery Court after formal probate in the Probate Court. The result of a contest in either case is a judgment binding on the parties to the contest. As to them the matter becomes *res judicata*. The procedure and the result of it are substantially the same whether the one court or the other is resorted to. After the admission of the instrument to probate in the Probate Court, an heir or distributee who did not contest in that court may contest by bill in Chancery just as if nothing had been done by the Probate Court. Though he had the statutory notice of the application for probate in the Probate Court, the judgment of that court admitting the instrument to probate is not *res judicata* as against him. It is well settled by the Alabama decision that a proceeding *in rem*, and that it never becomes in form or in fact a suit between adverse parties, unless there is a contest, and then only between the party alleging the existence of the will and the contestant. *Knox* v. *Paull*, 95 Ala., 505; *Kumpe* v. *Coons*, 63 Ala., 455; *Allen* v. *Prater*, 35 Ala., 169.

An heir at law, who has received the statutory notice of the application to probate, unless he appears and con-

tests the application, is not a party to the proceeding, and cannot appeal from the order or judgment made by the Probate Court therein. *Clemens* v. *Patterson*, 38 Ala., 721.

It plainly appears from the decisions just cited that by the institution of a contest the character of the proceeding is transformed from one *in rem* into a suit between adversary parties. It becomes a "suit" when a contest is instituted. The effect of the statutes as above stated has been repeatedly recognized by the Supreme Court of Alabama. See *Johnston* v. *Glasscock*, 2 Ala., 218; *Kumpe* v. *Coons*, 63 Ala., 448; *Lyons* v. *Campbell*, 88 Ala., 462; *Knox* v. *Paull*, 95 Ala., 505.

In the case first cited, *Johnston* v. *Glasscock*, 2 Ala., 218, after reviewing the methods of contesting wills prevailing under the common law, calling attention to the facts that under that system, as to personal estate, the will derived its potential force solely from the probate, without which an executor was unable to sustain an action, while as to real estate the probate was without effect, and the question of the existence of an alleged will of real estate was properly determinable in an action of ejectment, on an issue of *devisavit vel non*, the court said:

"From this statement of the law, as it existed unaffected by statutes, it will be seen that there were many and important distinctions between wills of real and personal estate both with respect to the manner by which they could be established and the mode by which they might be controverted. Our statute of 1806 seems to have intended to provide a common mode by which wills of either description may be established in the first instance."

The court further says, in reference to the statute, that it "also provides a new mode by which the heir at law, or the next of kin, can contest the will in such a manner that one suit will be conclusive and final;" and that "the

opportunity afforded by the statute to the heir at law and next of kin, or others concerned in the will, to contest it in Chancery after it has been admitted to probate in the county court seems to be given in place of the proof in solemn form, as previously practiced in the ecclesiastical courts, when the will was of personal property and of the action of ejectment when the will was of real estate." In the case of *Knox* v. *Paull*, 95 Ala., 505, it was decided that an heir at law who had not contested in the Probate Court could contest by bill in Chancery though he had been served with the statutory notice of the original application to probate, and the court in its opinion (p. 509) clearly recognizes that the contest is substantially the same proceeding whether instituted in the Probate Court before formal probate or afterwards by bill in Chancery. In either case the proceeding is the statutory substitute, where the will disposes of real estate, of the action of ejectment at common law. In other words, where the question of the validity of a contested will of real estate was determined in an action of ejectment at common law that question must now, under the Alabama Statutes, be disposed of on a contest either in the Probate Court or by bill in Chancery. The controversy between one claiming under an alleged will of real estate and an heir at law denying the validity of the instrument is the same thing now that it was when the common law was in force. The change worked by the Alabama Statute is in the form of the proceeding for the trial of the question. A suit which would have taken the form of an action of ejectment at common law, as the result of the Alabama Statute, takes the form of a contest either in the Probate Court or in the Chancery Court.

The will in this case, as shown by the averments of the petition for the removal of the cause (Record, p. 1),

disposed of real estate in Alabama of the value of more than ten thousand dollars. But for the Alabama Statutes above quoted the controversy on the subject between the heir at law and the devisee would have taken the form of an action of ejectment. The Circuit Court of the United States would have jurisdiction of such a suit if there was the requisite diversity of citizenship and value of the matter in controversy. That jurisdiction cannot be impaired by changing the form of the proceeding. The expression used in the judiciary acts "all suits of a civil nature, at common law or in equity," certainly includes an action of ejectment in which the question of the validity of a will of real estate is involved. If controversies of this nature are included in the grant of jurisdiction State legislation cannot impair this jurisdiction by merely changing the form of the proceeding. If a case is in its essence a suit at law State legislation cannot change its nature. *Smith* v. *Adams*, 130 U. S., 167; *Smyth* v. *Ames*, 169 U. S. 516; *In re Stutsman County*, 88 Fed. Rep., 337; *In re* Jarnecke Ditch, 69 Fed. Rep., 161.

In the last cited case the court said: "But the legislation of a state cannot by making special provisions for the trial of particular controversies, nor by declaring such controversies to be special proceedings and not civil suits at law or in equity, deprive the federal courts of jurisdiction, nor prevent a removal. A State legislature, if the constitution of the State does not forbid it, may provide for the trial of any cause in some special way unknown to the methods of procedure at law or in equity. But, whatever the method of procedure, it would be none the less a trial if conducted by a tribunal having power to determine questions of law and fact; and if the subject-matter constituted a controversy involving the legal or equitable rights of parties, it might be cognizable in the courts of the United States. Unless this were so, the only

thing the legislature of a state would have to do to entirely destroy the jurisdiction of the federal courts and the right of removal would be to abolish all suits at law and in equity, and substitute special statutory methods of procedure. Neither the legislature nor the courts of a State have the power, by giving new names to legal proceedings, to change their essential character. Courts will look beyond forms to the substance, and from it determine whether the controversy, in its essential nature, is a suit at law or in equity, as understood by the courts of the United States."

The present case being a controversy as to the valadity of a will of real estate, the issue being what was known to the common law as the issue *devisavit vel non*, the controversy, in its essential nature, is a suit at law, and the change in the method of procedure effected by the Alabama Statute could not change the nature of the suit so as to put it beyond the reach of the jurisdiction of the federal court. It is submitted that there is nothing in the nature of the suit to keep it out of the United States Court.

The question of the right to remove to the federal court such a proceeding for the contest of a will as that provided by the Alabama Statute has been several times passed upon by the Circuit Courts of the United States.

There is some apparent conflict in the rulings of the different courts on the subject. The right to remove such a proceeding is clearly established by rulings of the Circuit Court for the Northern District of Georgia, of the Circuit Court for the Eastern District of Arkansas, and of the Circuit Court of Appeals for the Ninth Circuit. *Brodhead* v. *Shoemaker*, 44 Fed. Rep., 518; *Franz* v. *Wahl*, 81 Fed. Rep., 9; *Richardson* v. *Green*, 61 Fed. Rep., 423. On the other hand, the right to remove contests of the

probate of wills has been denied, as in the cases of *In re Cilley*, 58 Fed. Rep., 977; *Reed* v. *Reed*, 31 Fed. Rep., 49; and *In re Aspinwall's Estate*, 83 Fed. Rep., 851. In the cases in which the right of removal has been denied the proceeding was merely one to probate a will, being purely *in rem*, and not resulting in a judgment binding upon parties, or the court was misled by the mere form of the original proceeding, and did not give due weight to the circumstance that though the proceeding started as a proceeding *in rem* for the probate of a will it had been transformed into a suit *inter partes* by the institution of a contest. In the case of *Franz* v. *Wahl*, 81 Fed. Rep., 9, the court said, in disposing of the question: "Is the proceeding to probate a will a case at law or in equity which is removable under the federal statutes": "It would seem only necessary to recur to well established fundamental principles in order to reach a proper conclusion. In the first place, the question of the validity of the will was one of which courts at law had jurisdiction by proceeding to try the ~~devisavit~~ *devisavit vel non* at the time the federal system of judiciary was established. It was therefore a case at law, within the meaning of the federal statutes; and, where the necessary conditions of adverse citizenship and local prejudice existed, it was a proceeding properly cognizable in a court of the United States, either upon suit brought there, or properly removed to it. That proceeding has been abolished by the Arkansas Statutes, and now the only way to contest a will is by objection to its probate in the probate court, or by appeal from the order of the probate court to the Circuit Court. If this proceeding cannot be removed to the federal courts, then the right to contest a will in the federal courts at all is taken away by the Arkansas practice acts. This cannot be done. State legislation cannot curtail, by chang-

ing rules of practice or laws regulating the jurisdiction of the courts, the jurisdiction of federal courts." In the case of *Brodhead* v. *Shoemaker, supra*, it was decided by Judge Pardee that a proceeding under the provisions of the Georgia Code for probating a will in solemn form by a proceeding *inter partes*, which is conclusive against those contesting the will, is a suit within the meaning of the removal statutes. It appears from the opinion in the case of *Richardson* v. *Green, supra*, that under the laws of Oregon the validity of a will could not be contested in the proceedings to probate it, which are purely *ex parte*; but such contest must be made the subject of a direct attack upon the will in a formal suit *inter partes*; and the court decided, Justice McKenna, then Circuit Judge, concurring, that this latter proceeding, being a suit between parties, is one of which the United States Circuit Court may take jurisdiction, where the amount in controversy is sufficient, and the parties are citizens of different states. A difference between the Oregon law which was under review in this case and the Alabama law is that, though the proceeding for the probate of a will in the Probate Court in Alabama is when instituted an *ex parte* proceeding *in rem*, as under the Oregon Statute, and cannot be made a suit between parties by any act of the proponent; but in Alabama, before the probate, it may become in form and in fact a suit *inter partes* by the filing of a contest by an heir at law or distributee. *Kumpe* v. *Coons*, 63 Ala., 445; *Knox* v. *Paull*, 95 Ala., 507.

While this court has not had occasion to pass upon the question of the jurisdiction of the federal courts of a contest of a will before its probate, yet the principles which are applicable in determining the question are stated in several cases. In *Ormsby* v. *Webb*, 134 U. S., 47, the proceeding commenced as an application to probate a

will. The objection was made in this court that the final judgment of the Supreme Court of the District of Columbia, affirming an order of the same court, in special term, admitting a will to probate and record, was not a final judgment within the meaning of the statutes authorizing a review by this court of final judgments of the Supreme Court of the District of Columbia "in any case" involving a specified amount. Mr. Justice Harlan, delivering the opinion of the court said:

"So that the only question is whether the issues framed by the Supreme Court of the District, and which involve an inquiry as to whether the decedent was or was not incompetent, from unsoundness of mind or because of undue influence exerted upon him, to make a will—issues to which there are adversary parties—constitutes a "case" within the meaning of the Act of Congress defining the jurisdiction of the court over the final judgments and decrees of the court below. If it does not then it would follow that a proceeding in the Supreme Court of the District to revoke the probate of a will is a 'case' the final judgment in which, as held in *Carter* v. *Cutting*, may be re-examined by this court, when the value of the matter in dispute is sufficient, while a proceeding in the same court, involving the validity, as a last will and testament, of an instrument offered for probate, and thereof its admission to probate, is not a 'case,' the final judgment in which can be here reviewed. We cannot assent to this view. The latter proceeding is as much a 'case' as the former. One involves the validity of the probate of a will, the other the validity as a will of a paper offered for probate. Upon the determination of each depend rights of property, and in each are adversary parties. There can be no reason why Congress should extend the jurisdiction of this court to proceedings involving the validity of the probate of wills, and not to proceedings involving the validity of an instrument offered for probate as a will."

This ruling supports the proposition that where a controversy as to the validity of an alleged will is litigated between adversary parties in a court of justice in a manner provided by law, the contest is a "case" or "suit," though it arose in a proceeding which started out as a proceeding *in rem* for the probate of a will.

In *Upshur County* v. *Rich*, 135 U. S. 467, the court said:

"Although the granting of a probate of a will is not ordinarily a suit, yet, if a contestation arises, and is carried on between parties litigating with each other, the proceeding then becomes a suit."

In *Ellis* v. *Davis*, 109 U. S. 485, the decision was that a bill in equity to set aside a will could not be sustained, because the remedy at law under the Louisiana procedure was plain and adequate; but, in its discussion of the equitable jurisdiction of the United States courts in controversies involving the validity of wills, the court recognizes the fact that contests under provisions of State law, though arising in a probate proceeding, may well be suits of which the United States courts could acquire jurisdiction. The court said:

"Jurisdiction as to wills and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties. It has been often decided by this court that the terms 'law' and 'equity,' as used in the Constitution, although intended to mark and fix the distinction between the two systems of jurisprudence as known and practiced at the time of its adoption, do not restrict the

jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well, not only rights newly created by statutes of the States, * * * but new forms of remedies to be administered in the courts of the United States, according to the nature of the case, so as to save to suitors the right of trial by jury in cases to which they are entitled to it, according to the course and analogy of the common law."

It is not contended that a mere probate proceeding, which has not assumed the form and is not in fact a suit between adversary parties, could be removed into the United States Court. As said in *Gaines* v. *Fuentes*, 92 U. S. 10, referring to the ruling on the subject in *Broderick's Will*, 21 Wall., 504, "the reason lies in the nature of the proceeding as one *in rem*, which does not necessarily involve any controversy between parties; indeed, in the majority of instances, no such controversy exists." The United States Courts "have no machinery for registering a will, issuing letters, and directing and supervising administration." *Hargrove* v. *Redd*, 43 Ga. 142, 150.

To prove a will in simple form no suit is required. No written petition is necessary. *Small* v. *McCalley*, 51 Ala., 527. In this case the will is probated so far as the proceeding is *ex parte*. The affidavit of the surviving witness, reduced to writing and signed by him (Pr. Rec., 37), is all that can be done as an *ex parte* probate. The fact that the Probate Judge did not order the will to be recorded does not affect the fact that it is proved *ex parte* or in common form. The provision as to recording is merely directory. *Reese* v. *Nolen*, 99 Ala., 206. Until the contest was filed there was no suit in any sense. The contest was a direct proceeding to invalidate the will. It is a statutory suit to contest the will. It is a "civil ac-

tion." 16 Ency. of Pleading and Practice, pp. 995, note, 1008.

Applying to the Probate Court to receive the proof of an alleged will and to admit it to record is no more a suit of which the United States Courts could acquire jurisdiction than is an application to the same court to receive a deed or mortgage and spread it upon the public records. It is no part of the functions of the United States courts to perform such purely administrative duties. Their jurisdiction does not extend to such *ex parte* administrative proceedings. But certainly, when, by the institution of a contest, a controversy is presented in reference to the alleged will, which must be litigated between parties, and result in a judgment binding upon them, it cannot be said that the contest is not a suit merely because the subject matter of it, the alleged will, made its appearance in court in an *ex parte* application for its probate.

By the institution of the contest, the contestant's claim took such form that the judicial power was capable of acting upon it, and became the case of controversy of which the United States Court could acquire jurisdiction. *Smith* v. *Adams*, 130 U. S., 174; *Osborne* v. *Bank of U. S.*, 9 Wheat., 738; *West* v. *Aurora City*, 6 Wall., 139; *Boom Company* v. *Patterson*, 98 U. S., 407; *Hess* v. *Reynolds*, 113 U. S., 73.

The removal of the contest to the United States Court for trial there does not have the effect of imposing upon that court the functions of a court of probate or for the administration of estates. The litigated question as to the validity of the alleged will is determined there, just as it is in another state court when there has been a change of *venue* from the Probate Court, as authorized by the state statute. Code of Ala., 1896, secs. 4295, 4296. When there is such change of *venue* the court to which the

trial of the contest is removed does not perform the function of admitting the instrument to probate, but its judgment on the contest is certified to the probate court from which the trial was removed *; "and the will must be probated or rejected in such probate court as such judgment may be for or against the validity of the will." Code of Ala., 1896, sec., 4296. Where the trial is in the Chancery Court, that court does not become a court of probate. The court in which a trial of the contest is had, renders a judgment binding upon the parties as to the issues involved in the contest. The administrative function of admitting the instrument to probate is performed at the place where the state law requires it to be spread upon the public records, though the litigated case involved in a contest of the will may be tried in another forum.

IV. The Case was Removed into the Federal Court by a "Defendant being such Citizen of another State."

Conceding that the action of the lower court in ruling on the motion to remand is properly presented for review by this court that ruling was correct and must be sustained.

The objection that the defendant in error was not a "defendant" is not well taken. Certainly, he was a "defendant" within the reason of the rule restricting the right of removal to defendants. This discrimination was evidently based on the considerations that the plaintiff, having the selection of tribunals, would not voluntarily bring his suit in a court in which he could not expect to obtain justice, and that any local prejudice or influence would be in his favor, and against a non-resident sued by him in a State court; so that the prejudicial influence to be guarded against is likely to be in favor of the party

invoking the jurisdiction of the court and against the party whose presence in court is the result of the necessity of his appearing to defend his interests there assailed. "It was originally supposed that adequate protection against such influences was secured by allowing to the plaintiff an election of courts before suit; and, when the suit was brought in a State court, a like election to the defendant afterwards." *Gaines* v. *Fuentes*, 92 U. S., 10; *Waco Hardware Co.* v. *Michigan Stove Co.*, 91 Fed. Rep., 289; Dillon on Rem. of Causes, (Black's Ed.) Sec. 65. The contestant was certainly the plaintiff in the sense that she took the step, by filing her contest, by which the question of the validity of the will became a matter of controversy to be litigated in a proceeding which would result in a judgment binding upon all persons claiming under the will.

There was no controversy until the contest was inaugurated. The proceeding would have been merely one *in rem* unless, by the filing of the contest, it had been transformed into a suit between adversary parties. The filing of the contest was the institution of the suit. *Knox* v. *Paull*, 95 Ala., 507; *Allen* v. *Prater*, 35 Ala., 169. The contestant had the selection of the forum. It was not necessary for her to contest in the Probate Court. If the will had been admitted to probate there, without any contest having been made by Mrs. McDonnell, she could still have contested by bill in Chancery. The only issues that could be tried in either court were the issues presented by the contestant. She was the plaintiff in the sense that she brought the case into court, and by her pleading presented the only questions upon which issue could be taken. It is generally recognized that the institution of a contest of a will under statutory provisions is the bringing of a civil action, and that the contestant is the

plaintiff. 16 Ency. of Pleading and Practice, pp. 995, 1008. That a contestant really occupies the position of a plaintiff is well shown by the ruling in the case of *Barksdale* v. *Davis*, 114 Ala., 623. That case was a contest of a will by bill in Chancery. Among other grounds of contest alleged in the bill were the following:

"(C.) That the execution of said will was obtained by undue influence on the part of Amanda Barksdale, one of the devisees in said alleged will. (D.) That the execution of said will was procured by fraud on the part of said Amanda Barksdale. (E.) That the execution of said will was procured by undue influence by said Martha Barksdale, one of the devisees of said alleged will. (F.) That the execution of said will was procured by fraud by the said Martha Barksdale."

Demurrers were interposed to the bill on the ground that it did not state facts constituting fraud and undue influence. In disposing of these demurrers the court said:

"Grounds C, D, E and F charge in general terms, first, that the will was procured by undue influence by Amanda Barksdale, one of the devisees under the alleged will, and next by fraud on the part of said Amanda. Neither the particular undue influence and fraud, nor how the same were exerted, are stated.

"It is conceded that, according to the general rules of equity pleading, in other cases, these averments are not sufficiently specific; but it is contended that, on the contest of a will the entire laboring oar is upon him who asserts the validity of the will, and the contestant need do no more than to allege generally its invalidity. Our old cases of *Johnson* v. *Glasscock*, 2 Ala., 218, and *Johnson* v. *Hainsworth*, 6 Ala., 443, are to be relied upon to support the contention. These cases hold that, under the statutes then

existing, the complainant need only allege the facts showing such relationship, on his part, to the deceased as entitles him to contest the supposed will, with a prayer for relief. At that time, there was no statute prescribing the allegations, written or otherwise, necessary to be made in order to inaugurate and try the validity of a will. The methods of procedure were under the control of the court. Pursuing the principle that the burden was upon him who set up the validity of the instrument as the will of the alleged testator, it was held, as above stated, the contestant was required to allege nothing more than his interest entitling him to contest.

"Article 111, Title 4, Part 2 of the present Code is devoted to the subject of contesting the validity of wills. The first section of this article (1989) provides that, 'A will, before the probate thereof, may be contested by any person interested therein, or by any person who, if the testator had died intestate, would have been an heir or distributee of his estate, by filing in the court where it is offered for probate allegations in writing that the will was not duly executed, or of the unsoundness of mind of the testator, or of any other valid objections thereto; and thereupon an issue must be made up, under the direction of the court, between the person making the application as plaintiff, and the person contesting the validity of the will, as defendant; and such issue must, on application of either party, be tried by a jury.' Then follow provisions for the trial and the rendition of judgment in the probate court, following which, in the same article, is section 2000, under which this bill is filed, providing that, 'Any person interested in any will, who has not contested the same under the provisions of this article, may, at any time within five years after the admission of such will to probate in this State, contest the validity of the same by bill in Chancery, in the district in which such will

was probated, or in the district in which a material defendant resided."

"*It is manifest that these provisions were introduced to change the policy of the law obtaining prior to their adoption, by requiring the contestant, by written procedure, to set forth the grounds upon which he expects to contest the validity of the proposed will, and to confine the trial, after proof of the due execution of the will, to the issues which his allegations tender. The purpose of the change was that which underlies the law of pleading generally, that the parties may be certainly advised of the issues to be tried, and the court enabled to proceed intelligently in adjudicating their rights.*"

In subservience of this general rule, it is a familiar principle of equity pleading that the complainant must distinctly allege the facts upon which he relies for relief. Mere general statements or conclusions will not suffice. Thus, if fraud be relied upon, the general charge that fraud was committed is, of course, not sufficient but the particular facts constituting the fraud must be stated; otherwise the opposite party would be practically without information of what he was called upon to defend.

"Upon a contest of a will, when fraud or undue influence is relied upon, the burden is upon the contestant to prove it. The opposite party is only required to prove the due execution of the will, according to the statute. It is as essential, therefore, that such party be informed, by distinct averments, of the facts constituting the fraud or undue influence so as to be prepared to meet them, as that such information be so given to any party, in any judicial proceeding; hence, there can be no well founded reason for holding that the legislature intended, when it required that the contest be in writing and set forth the grounds relied on, that only a general statement of such grounds, conveying to the opposite party, practically, no

information of value to him in the preparation of his cause, should be sufficient. If such was the legislative intent, the change in the law scarcely served a useful purpose.

"We are of opinion that the bill should set forth the facts constituting the fraud or undue influence charged."

This ruling shows that the Alabama Court clearly recognizes that the contest is the statement of a cause of action in favor of the contestant, making the contestee a defendant. *Walcott* v. *Watson*, 46 Fed., Rep., 529.

The word "defendant" as used in the Removal Act under consideration is used as a general term, and is employed with reference to any proceeding that is "a suit in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State." Such suits, as has been shown, may comprise many proceedings the parties to which are not designated by the State laws "plaintiffs" and "defendants." And so, having regard to the legislative purpose and the object in view in conferring the right of removal upon defendants, to prevent a party from voluntarily bringing an action in a State court and then capriciously removing it, it is submitted that the word "defendant" is to be taken in its enlarged sense as meaning, not merely one who in the legal phraseology of local statutes is called the defendant, but the person who in any civil proceeding is the party against whom any legal action is taken or directed, or whose interest in the matter in controversy is such as to require him to come in and resist a proceeding which could result in depriving him of all right and title to property.

The circumstance that the statute provides for making up the issues in a contest in the Probate Court "between

the person making the application, as plaintiff, and the person contesting the validity of the will, as defendant", is entitled to no weight in determining who is plaintiff and who is defendant within the meaning of the removal act. The contestant is plaintiff because she selects the court and presents the questions to be tried. What she does is the institution of a statutory suit to contest the will. 16 Ency. of Pleading and Practice, p. 1008. The contestee is a defendant because he is brought into court against his will by the necessity of defending his right under the will, and his involuntary presence there subjects him to the local prejudice and influence protection against which is the object of the statute.

The arbitrary action of the State Court in declining to recognize the defendant in error as a defendant to the contest, and in striking from the file his petition and answer did not affect his right to defend his title necessarily involved by the institution of the contest, and to remove the contest. Any one interested in a will has the right to have himself made a party to the proceeding at any time before the rendition of a judgment on the application to probate, and even after judgment, for the purpose of appealing. *Clemens* v. *Patterson*, 38 Ala., 721, 724; *Lees* v. *Browning*, 15 Ala., 494; 16 Ency. of Pleading and practice, 1017. When one has done all that he could to become a party, and has been wrongfully refused the right by the State Court, he is a party sufficient for the purpose of removing the case, if otherwise he has the right to remove the case. *Snow* v. *Texas Trunk Railroad*, 16 Fed. Rep., 1; *Hack* v. *Chicago & S. G. Ry. Co.*, 23 Fed. Rep., 356; 20 Am. & Eng. Ency. of Law, 989 and cases cited. By filing his petition and answer he secured a standing in the case from which he could not be lawfully removed without his consent. *American*

Nat. Bank v. *National Benefit & Casualty Co.*, 70 Fed. Rep., 420, 422.

V. The application to remove was made in proper time.

The plaintiff in error is guilty of the inconsistency of objecting to the removal on the ground that it was made too soon, before the defendant in error had acquired any standing in the case, and then objecting that the application to remove came too late. There is nothing in the record to indicate that the pendency of the proceeding was brought to the notice of Llewellyn Jordan, the principal beneficiary under the will, until the original proponent asked to have him made a party to the proceeding, so that he could defend his interests against the contest which had been instituted. He at once intervened and answered the contest. He applied for a removal of the case to the United States Court at the earliest possible moment.

The rule is that a removal is never too late when the application is made as soon as the proceeding assumes the shape of a removable cause in the court in which it originated.

Powers v. *Chesapeake & Ohio Ry., 169 U. S., 101.*
Speckart v. *German Nat. Bank, 85 Fed. Rep., 12.*
Burdick v. *Peterson, 6 Fed. Rep., 840.*
20 *Am. & Eng. Ency. of Law*, 990, note 3.
Hack v. *Chicago, G. S. Ry. Co., 23 Fed. Rep., 356.*
Frank v. *Railroad Co., 16 Fed. Rep., 1.*

After the time for removal is out if the complaint is amended so as to create a new cause of action, the case may then be removed.

Bailey v. *Mosher*, 95 Fed. Rep., 223.
Molton v. *Reynolds*, 62 Fed. Rep., 417.

The same principle would authorize a removal when a new party appears, whose presence then for the first time injects into the case the features which gives the right of removal.

VI. The Defendant in Error being the sole party having an Interest adverse to the Plaintiff in Error his right to remove was not affected by the Presence of a Merely Nominal Party.

W. E. Jordan, who originally filed the will for probate, was a mere nominal party. He had renounced any right to letters testamentary under the will before the application for removal was made. (Pr. Rec., p. 38.) The defendant in error was the sole beneficiary under the will, W. E. Jordan having no real interest in the controversy his citizenship did not affect the jurisdiction. *Removal cases*, 100 U. S., 457; *Barney* v. *Latham*, 103 U. S., 205; 1 Desty's Federal Procedure (9th Ed.), p. 457. But even if W. E. Jordan could be considered as a material party, the controversy between Ada F. McDonnell, the only heir, a citizen of Alabama, and Llewellyn Jordan, sole devisee under the will, a citizen of Mississippi could be removed by the latter on the ground of prejudice or local influence under the statute authorizing such removal by "any defendant," &c. *Whelan* v. *New York, &c., R. R. Co.*, 35 Fed. Rep., 849; *Bonner* v. *Mickle*, 77 Fed. Rep., 495; *Jackson & Co.* v. *Pearson*, 60 Fed. Rep., 125.

Respectfully submitted,

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No. 253.

FILED
APR 21 1900
JAMES H. McKENNEY,
Clerk.

Sup. Ct. Brf. of Walker for D. E.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed April 21, 1900.

No. 253.

ADA F. McDONNELL, PLAINTIFF IN ERROR,

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

RICHARD W. WALKER,
Counsel for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-21-1900

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Par. 1. That the contestant really occupies the position of plaintiff is shown in the rulings in several cases not cited in the original brief. The *contestant* in Alabama is called the *caveator* in other States.

"It appears to us to be perfectly clear that in this case, thus situated, the caveators are to be regarded as the assailants of the will, as the actors who originated this proceeding, and who are therefore entitled to be placed upon the record in the attitude of plaintiffs. In the case now before us, the appellant was undoubtedly the *assailant* of the

paper as a will, and the *actor* who originated this proceeding, namely, the framing of issues to try its validity as a testamentary paper."

Edelin *vs.* Edelin, 6 Md., 293.

In the case of *Emmons vs. Garnett*, 18 D. C. Rep., 59, which was a will contest, the court said:

"The remaining objection is to the order of the Orphan's Court assigning who should stand upon the record as plaintiff and who as defendant. We think the Orphan's Court was in error in passing that order, because it belongs entirely to the circuit court, where the issues are to be tried, to determine who shall be plaintiff and who shall be defendant on the record. It is the uniform practice in the State of Maryland, from which we derive our probate system, in a trial of issues from the Orphan's Court before the circuit court, to make the caveator plaintiff on the record and the caveatee the defendant. That is the act of the Circuit Court, not the act of the Orphan's Court.

"A case in which the question was determined definitively and set at rest by the Court of Appeals of Maryland, was the case of Stocksdale *vs.* Cullinson, 35 Maryland, 322, where the court said that it was the uniform practice in the State of Maryland to make the caveator the plaintiff and the caveatee the defendant, no matter what the issue was. This is in entire analogy to the practice of the courts of law in the trial of issues. It does not make any difference who has the affirmative of any issue in a court of law as to the privilege of opening and closing before the jury. A familiar instance is where there is a plea in confession and avoidance. Now, although the defendant has the affirmative upon himself to sustain his plea of confession and avoidance, nevertheless the plaintiff opens and closes the case before the jury. We must not confound the opening and concluding before the jury with the opening and concluding in assuming and discharging the burden of proof before the court and jury. The plaintiff, where there is a plea in confession and avoidance, simply opens his case by stating it before the jury, and then the defendant brings in his affirmative proof, and the burden is upon him all the way, in such a case, to maintain his plea. Nevertheless, though the burden be upon him throughout, so far

as the proof is concerned, the privilege remains with the counsel for the plaintiff to open and conclude the argument before the jury, and so with regard to the case of caveator and caveatee."

In California, where the contest is substantially the same proceeding as the contest in Alabama, it is well settled that the contestant is the plaintiff and the petitioner or proponent is the defendant.

Estate of Dalrymple, 67 Cal., 444.

In the case of *Moore vs. Heincke* (Ala.), 24 So. Rep., 377, the Supreme Court of Alabama followed, in reference to a contest in the Probate Court, the ruling made in *Barksdale vs. Davis*, 114 Ala., 623, and held that the statement of the grounds of contest determined the issues in the case. This shows that as to the pleading in the case, the contestant occupies the position of plaintiff. It is very plain that a person who presents a will for probate does not by that act put himself in the position of the plaintiff in a suit. His petition is not supposed to present any issue. In fact *no written petition is necessary.*

Small vs. McCalley, 51 Ala., 527.

Under the Alabama law, as under the Maryland law above referred to, the contestant is the assailant of the will, he is the actor who originated the proceeding, he is the person whose pleading places before the court the only questions which can be tried, he is the one who is pursuing a remedy, he is the one who seeks the judgment of the court that a certain paper is a nullity, and he is manifestly and confessedly a plaintiff if he contests in the Chancery Court. Can it possibly be said that he is not really the plaintiff if he brings his suit in the Probate Court, merely because in the framing of the issues in that court a statute calls him plaintiff? It would lead to manifest absurdity to give to that statutory regulation controlling effect in determining who

is plaintiff and who is defendant in the proceeding. The result would be that in Maryland or in California a person claiming under a will could remove a contest to the Federal court because the state statute or practice denominated him a defendant, but that in Alabama a person occupying exactly the same position in a proceeding exactly similar in form and in substance could not remove it to the Federal court because the Alabama statute called him a plaintiff. This would amount to saying that a party's right to removal depends upon what a state statute calls him.

Par. 2. It is assumed in the brief for the Plaintiff in Error, on the motion of the Defendant in Error to dismiss or affirm, that it was in the power of the judge to hold the case open, and to enter judgment or make orders at some other place than that fixed by law for holding the court, at such time as might suit him; and that the making of the certificate of questions of jurisdiction at Birmingham was an exercise of this power. There is nothing to indicate that the judge undertook to hold the case open while the court was in session for any future action on it at some other place, and no attempt is made to show by the record that the certificate signed by Judge Bruce was made while he was holding court at Huntsville. His statement at the end of the certificate shows that this was done at Birmingham,—outside of the Northern Division of the Northern District of Alabama. Reference is made to the fact that judges of the United States courts frequently hear and decide cases at places other than those fixed by law for holding the court. That this is true is notorious. How this happens is well illustrated by the recent case of *Continental Trust Co. vs. Toledo, St. L. & K. C. R. Co.*, 99 Fed. Rep., 171, 174. The validity of such action depends upon the consent or acquiescence of the parties. There was no such consent or acquiescence in reference to the certificate in this case. This being so, the act of the judge in making the certificate at a place other than that fixed by the law as the place for holding the

court cannot be treated as a certificate by the court. In addition to the authorities cited in the brief heretofore filed in support of this proposition, attention is called to the legal definition of the word "court" given by the Century Dictionary:

"In law, a tribunal duly constituted and present at a time and place fixed pursuant to law, for the judicial investigation and determination of controversies. The court is not the judge or judges as individuals, but only when at the proper time and place they exercise judicial powers."

Par. 3. In the brief filed by Counsel for Plaintiff in Error on the motion to dismiss or affirm it is contended that the motion to remand, which is copied in the transcript, though not brought up in a bill of exceptions, is a part of the record, and that no bill of exceptions was necessary to show to the appellate court such motions and the rulings of the lower court thereon. This contention cannot be sustained. A motion to remand is not a part of the *record* as described by this court in the case of *Clune vs. United States*, 159 U. S., 590. It is not included in "the pleadings, the process, the verdict, and the judgment;" and it is not a matter which by any "statutory or recognized method has been made a part of it." The rule against appellate courts considering motions and rulings thereon not made a part of the record by bill of exceptions is not confined to motions not based upon matters not disclosed by the record. Mr. Freeman (1 Freeman on Judgments, 4th Ed., sec. 79) includes "all motions" among the matters which are not (unless made so by bill of exceptions, by consent, or by order of court) matters of record. The motions which the court declined to consider in the case of *Stern vs. Collier*, 101 Ala., 424, because they were not made a part of the record by bill of exceptions, were motions based exclusively upon matters disclosed by the judgment itself. In the case of *Wiggins vs. Witherington*, 96 Ala., 535, the rule was applied to a

motion in arrest of judgment, and to a motion to amend a judgment entry *nunc pro tunc*, this latter motion being one which must be founded upon matter appearing of record. The case of *Powell vs. Henry*, 96 Ala., 412, was referred to by counsel for Plaintiff in Error. The motion which the court held in that case should have been shown in the record and not in the bill of exceptions was a motion to strike from the file a demurrer, the court deciding that this motion was a part of the pleadings in the case. Of course, the record and not the bill of exceptions, is the place for the pleadings. But a motion to remand is no part of the pleadings. It is not one of the steps leading to the judgment in the case. It is not a paper necessary to support the judgment. Such a motion may be based upon matter resting in parol, upon mere matters of procedure, upon objections that may be waived. It need not be in writing. The motion itself is not necessary if jurisdiction is not shown. Furthermore, the motion copied in the transcript in this case does not rest solely upon matters disclosed by the record. It undertook to present an issue of fact as to the existence of prejudice and local influence, and some of the objections to the removal referred to matters of mere procedure, as the time when the application was made,—a matter which a party could waive. Certainly such objections are not presented to this court for review when not reserved by a bill of exceptions. In the case of *England vs. Gebhardt*, 112 U. S., 502, this court decided that papers filed in the lower court on an application to remand do not belong to the record brought up by a writ of error unless made a part thereof by a bill of exceptions, and that such papers not so made a part of the record will not be considered by this court. The rule was also applied in that case to the memorandum or opinion of the judge embodying his ruling on the motion to remand. In the present case the ruling on the motion to remand is not shown by any minute entry by the clerk, but only by a memorandum of his ruling

signed by the judge, which does not belong to the record. In the case of *Railroad Co. vs. Koontz*, 104 U. S., 5, the court said (pp. 15, 16), speaking of a review of the overruling of a motion to remand: "If his motion is decided against him, he may save his point on the record, and after final judgment bring the case here for review, if the amount involved is sufficient for our jurisdiction." Taking an exception and preserving it by bill of exceptions is what the court must have referred to in speaking of saving the point on the record.

Par. 4. The cases cited by counsel for the Plaintiff in Error (see pages 4 and 5 of their brief on motion to dismiss or affirm) as stating and applying the rule that this court will, of its own motion, whether or not the question is raised by either party, search the record to ascertain if it discloses a case within the jurisdiction of the United States court, were all cases where the appeal or writ of error operated to remove the case into this court, for its review generally. This is not such a case. A case must in some proper way get to this court before any question that could be involved in it is presented to the court for its determination. The Plaintiff in Error has undertaken to bring her case directly to this court from the Circuit Court. The objection is made that the record does not disclose the kind of case which the statue permits a party to bring directly to this court; that the writ of error should be dismissed because it is merely an attempt to get a review by this court in a case in which the right to obtain such a revision is withheld by the statute now in force. To apply the rule laid down in the decisions above referred to to cases of review by this court of questions of jurisdiction under section 5 of the act "to establish Circuit Courts of Appeals," &c., would involve an utter disregard of the restrictions and limitations imposed by that section upon the right of a party to have such question reviewed by this

court. That statute establishes the rule that a party must go to the Court of Appeals for the review of judgments of the Circuit Court. The right to apply to this court to review such judgments is confined to certain classes of cases which are made exceptions to the rule. A party is not entitled to have such review by this court unless his case is brought within one of these exceptions. One of these exceptions is where the jurisdiction of the court is "in issue;" and "in such cases the question of jurisdiction alone shall be certified to the Supreme Court for decision." To come within this exception the jurisdiction must have been "in issue" in the court below, and this question of jurisdiction must be certified by that court. This excludes cases in which no question as to the jurisdiction was made in the lower court. The "record" must be looked to to ascertain if it discloses a case which the statute permits a party to bring here on a writ of error. The jurisdiction cannot be said to have been "in issue" unless the record shows that it was affirmed on the one side and denied on the other,—presented as a controverted point for the determination of the court. *Carey vs. Houston & T. C. R. Co.*, 150 U. S., 170. In providing that the jurisdiction shall be in issue and in requiring the lower court to certify the particular question raised and decided by it to this court, the statute discloses a manifest purpose to relieve this court of any duty of searching the record in such cases to find questions of jurisdiction not raised in the lower court, and to limit its duty in this regard to the decision of questions of jurisdiction duly raised in the lower court, which the record shows were decided by that court, and then certified to this court. If, notwithstanding the requirements that the jurisdiction must be in issue in the lower court, and that the question must be certified, a party may still remove the record into this court without showing a compliance with these conditions, and get the case dismissed from the United States court, under the rule that the record must show that the court

had jurisdiction, then the statute has failed to accomplish its manifest purpose of restricting the right of appeal and of limiting the duty of this court to the answering of specific questions certified to it. The effect would be to give the writ of error the effect of removing the case into this court, though the statute does not authorize the party to bring directly to this court such a case as his record discloses.

Par. 5. If the motions set out in the transcript are consdered as properly shown without a bill of exceptions, then the motion to strike from the files, which was made on the 3d day of September, 1897, (Printed Record, p. 10) before any motion to remand was made, was a recognition by the Contestant of the power of the United States court to make orders in the case, and was a waiver of the right to make a motion to remand not based upon a total want of jurisdiction in such a case. By thus asking the court to take judicial action in the case the Contestant waived any objections going merely to the time or manner of the case getting into the United States Court. (*Bridge Corporation vs. Lumber Co.*, 71 Fed. Rep., 225; *Baltimore, &c., R. Co. vs. Ford*, 35 Fed. Rep., 170; *Wyly vs. Richmond, &c., R. Co.*, 63 Fed. Rep., 487; 18 Ency. of Pleading & Pr., 370, 371.)

Respectfully submitted.

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